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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 260

DIXIE OHIO EXPRESS COMPANY,
Appellant,

vs.

STATE REVENUE COMMISSION OF GEORGIA ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA.

STATEMENT AS TO JURISDICTION.

EDGAR WATKINS,
ALLAN WATKINS,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

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DIXIE OHIO EXPRESS COMPANY,
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vs.

STATE REVENUE COMMISSION OF GEORGIA ET AL.,
Appellees.

STATEMENT AS TO JURISDICTION.

Complying with Rule 12 of the revised rules of the Supreme Court of the United States, appellant shows:

The appellee, State Revenue Commission of Georgia, issued an execution against the appellant for a fee alleged to be due under the provisions of a statute of Georgia known as the Maintenance Tax Act (Printed Georgia Laws of 1937, page 155). A fi. fa. was levied on the property of the appellant and to the levy the appellant filed an affidavit of illegality which challenged the constitutionality of the Georgia Maintenance Tax Act upon the following grounds: (1) that the same constituted a burden on interstate commerce in violation of the commerce clause of the Federal Constitution; (2) that the statute constituted a prejudice and a discrimination against the appellant to the preference and advantage of appellant's competitors, and denied the appel-

lant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

The appellees filed a general demurrer to the affidavit of illegality, which was sustained by the trial court.

Upon writ of error to the Supreme Court of Georgia, the judgment of the trial court was affirmed, June 17, 1938, which held valid the Georgia Maintenance Tax Act.

Paragraph (a) of Section 237 of the Judicial Code, as amended (Title 28, Section 344, United States Code), gives jurisdiction to the Supreme Court of the United States on this appeal.

The date of the judgment here sought to be reviewed is June 17, 1938, and the date the application for appeal herein was presented for record July 19, 1938.

Cases showing that this case falls within the jurisdiction of this Court and that appeal lies are numerous. A leading and controlling case is that of *Smith* v. *Cahoon*, 283 U. S. 553.

The constitutional questions were raised in the trial court and were passed upon by the trial court and also the Supreme Court of Georgia. The only opinion rendered in the case was by the Supreme Court of Georgia, a copy of which is attached hereto.

Appellant has served upon appellees within five (5) days from the allowance of the petition a copy of the same and in addition an order allowing the appeal, together with a copy of the assignments of error and of this statement and this statement hereby specifically directs the attention of the appellees to paragraph 3, Rule 12 of the rules of the Supreme Court of the United States.

The statute of the State of Georgia, the validity of which is involved herein, is copied in the printed Georgia Laws of 1937 beginning at page 155 and a summary of the pertinent provisions of such statute is set out as follows:

The title of the act states, among other things, "An act to provide for the levy of a tax to be known as a Maintenance

Tax to be paid by owners of motor buses, trucks, and/or trailers operating over the public roads of this state."

Section 1 of the act reads in part (p. 156), "All persons, firms, corporations, or associations holding title to a motor bus, truck and/or trailer or having exclusive right to the use thereof for a period of more than thirty (30) days, shall pay a maintenance tax for the operation of such motor bus, truck, and/or trailer upon and over the public roads of this state, according to the schedule hereinafter provided. The maintenance tax herein provided for shall be in addition to any and all other taxes, licenses, or registration fees now required under existing laws."

Section 2 of the act, page 157 thereof, defines the terms used therein, including trucks and trailers.

Section 3B, page 158, contains the schedule pertinent to the issues in this case. "For each non-passenger carrying motor vehicle or truck not used as a common or contract carrier for hire, the following sums, to wit:

"1. For each non-passenger carrying motor vehicle or truck of less than one ton manufacturer's rated capacity..... $5.00

"2. For each non-passenger carrying motor vehicle or truck of one ton manufacturer's rated capacity..... 10.00

"3. For each non-passenger carrying motor vehicle or truck of more than one ton and not exceeding one and one-half tons manufacturer's rated capacity... 15.00

"4. For each non-passenger carrying motor vehicle or truck of more than one and one-half and not exceeding two tons manufacturer's rated capacity..... 30.00"

The schedule continues to increase in ratio to increase of manufacturer's rated capacity up to seven tons, for which

the fee is $1,125.00, but the higher brackets are not in issue here.

Section 3C, pages 159-160, provides: "For each non-passenger carrying motor vehicle or truck used either as a common or contract carrier for hire, the following sums, to wit:

"1. For each non-passenger carrying motor vehicle or truck of less than one ton manufacturer's rated capacity	$10.00
"2. For each non-passenger carrying motor vehicle or truck of one ton manufacturer's rated capacity	20.00
"3. For each non-passenger carrying motor vehicle or truck of more than one ton and not exceeding one and one-half tons manufacturer's rated capacity	50.00
"4. For each non-passenger carrying motor vehicle or truck of more than one and one-half and not exceeding two tons manufacturer's rated capacity	75.00"

The higher brackets are not included herein.

Section 3D, page 161, provides: "For each trailer or semi-trailer not used as, or in connection with a non-passenger carrying motor vehicle or truck used as a common or contract carrier for hire the following sums, to wit:

"1. For each trailer or semi-trailer not exceeding 1,000 pounds factory weight	$5.00
"2. For each trailer or semi-trailer exceeding 1,000 pounds but not more than 2,000 pounds factory weight	10.00
"3. For each trailer or semi-trailer exceeding 2,000 pounds but not more than 3,000 pounds factory weight	20.00
"4. For each trailer or semi-trailer exceeding 3,000 pounds but not more than 4,000 pounds factory weight	30.00

"5. For each trailer or semi-trailer exceeding 4,000 pounds but not more than 5,000 pounds factory weight 40.00

"6. For each trailer or semi-trailer exceeding 5,000 pounds but not exceeding 6,000 pounds factory weight ..... 50.00"

The higher brackets are not included herein.

Section 3E, page 162, provides: "For each trailer or semi-trailer used as, or in connection with, a non-passenger carrying motor vehicle or truck used as common or contract carrier for hire, the following sums, to wit:

"1. For each trailer or semi-trailer not exceeding 1,000 pounds factory weight ... $10.00

"2. For each trailer or semi-trailer exceeding 1,000 pounds but not more than 1,500 pounds factory weight 20.00

"3. For each trailer or semi-trailer exceeding 1,500 pounds but not more than 3,000 pounds factory weight 30.00

"4. For each trailer or semi-trailer exceeding 3,000 pounds but not more than 4,000 pounds factory weight 50.00

"5. For each trailer or semi-trailer exceeding 4,000 pounds but not more than 5,000 pounds factory weight 75.00

"6. For each trailer or semi-trailer exceeding 5,000 pounds but not exceeding 6,000 pounds factory weight ..... 100.00"

The higher brackets are not included herein.

Section 4 of the Act, page 163, provides that the tax shall be due and payable April 1, 1937, but that only three-fourths of the amount provided for in the act shall be payable for the year 1937.

Section 7, page 164, provides for a twenty per cent penalty in the event that the tax is not paid within thirty days after it is due.

Section 8, pages 164-5, provides that beginning January 1, 1938, all persons shall pay the full amount of the tax, as set out in the act.

Section 9, page 165, provides for the issuance of tags on paying the tax.

Section 10, page 165, provides "That all persons, firms, corporations or associations, whether resident or nonresident of this State making or causing to be made by or through any of their agents, servants, or employees more than two (2) trips per month into this State with any of the vehicles herein named shall be liable to and shall pay the tax herein provided for except that any of the named vehicles named herein shall be allowed a maximum of ten (10) trips per month into this State for the purpose of hauling seasonable agricultural products grown in this State without payment of the tax herein provided for."

Section 11, page 166, provides "That any and all moneys derived from the sale of maintenance tags shall be and the same are hereby allocated to the United States Rural Post Roads division of the State Highway Department of Georgia, to be expended through the director thereof, and the said moneys shall be prorated among the several counties of this state according to the number of miles of rural post roads in said counties."

Section 11-A, page 166, repeals the existing Georgia Mileage Tax Act.

The affidavit of illegality alleged that the Georgia Maintenance Tax Act, construed with other related motor vehicle acts, was unconstitutional as applied to appellant.

The other related acts will not be copied in full, but the pertinent provisions thereof are as follows:

Under the Motor Fuel Tax Law, Georgia Laws of 1937, beginning at page 167, Section 92-1403 of the Georgia Code of 1933, is amended to read as follows (page 174), "An excise tax is hereby imposed on all distributors of motor fuel and/or kerosene: (A) upon the sale or use of motor fuel by them within this State, at the rate of six ($0.06) cents per gallon."

Section 92-1404 of the 1933 Code is amended by the Motor Fuel Tax Law, page 180 of the Georgia Laws of 1937, "(A) The proceeds of the six ($0.06) cents per gallon tax on motor fuel shall be paid to the State Treasurer and by him distributed as follows: An amount equal to (1) four ($0.04) cents per gallon shall be set aside to the State Highway Fund, for use in construction on the State Highway System of Roads, or State Aid System of Roads; and (2) one ($0.01) cent per gallon shall be set aside to be distributed to the several counties of the State to be used exclusively for the construction and maintenance of public roads; and (3) one ($0.01) cent per gallon shall be set aside to the public schools of this State for an equalization fund."

The Georgia Legislature in 1937 passed an act creating United States Post Roads Division (Georgia Laws, 1937, page 912). The title of the act, as stated at page 912, is "An act to define United States Post Roads * * * and to provide for the construction and maintenance of farm to market roads * * * to create a system of United States Rural Post Roads in the State of Georgia." Section 6 of this Act (Georgia Laws, 1937, page 914) defines rural post roads as follows: "The term 'Rural Post Roads' shall mean all roads and highways in the several counties of the State of Georgia over which U. S. mail is carried, not included in the present highway system. The term 'Farm-to-Market Roads' in this Act shall mean all public roads and highways in the several counties of the State of Georgia, other than U. S. Post Roads and/or State-Aid Roads."

Section 95-1701 of the 1933 Georgia Code provides for a system of State Aid roads maintained by the state through the State highway department.

Section 68-211 of the 1933 Code, as amended by the act of 1935, page 157, provides that the annual fee for licensing of the operations of vehicles shall be $3.00 for each such vehicle registered.

Under Section 95-1703 of the 1933 Georgia Code, the funds derived from the sale of these $3.00 license fees are placed in the State Treasury, to be used by the Highway Department for the purpose of constructing and maintaining the State Highway System and State Aid Roads after the expenses of the Revenue Commission have been first deducted.

Section 68-601 through Section 68-634 provide for the regulation of motor common carriers within the State of Georgia.

Section 68-623 of the 1933 Code provides that every motor common carrier "shall annually on or before January first, as long as such certificate remains in force, or before the vehicle is put into use, as to a vehicle put into use during the course of the year, make application to the Commission for registration of all motor vehicles to be operated under said certificate in manner and form as the Commission may by rule or regulation prescribe, and shall pay to the Commission a fee of $25.00 for each vehicle for the registration of the same and the issuance of a permit or license to operate the same. * * * The money derived from the issuance and transfer of certificates and from the registration fee shall be subject to be used by the Commission for the administration and enforcement of this law, and any sum which may be left over and unexpended on the first day of January of each year shall be paid to the State Treasurer and shall be disbursed by him and paid to the State Highway Board for use in maintenance and repair of the high-

ways as in the discretion of the Highway Board may be directed."

Section 68-601 (e) of the 1933 Code defines motor common carrier as used in this Chapter of the Code as persons using motor propelled vehicles for the transportation of persons or property for hire on the public highways of this state. The legislature of Georgia passed an act in 1937 creating a department of public safety (Ga. Laws, 1937, p. 332). Under Section 6, page 346, a person operating a vehicle for hire must purchase a $2.00 chauffeur's license. Persons not operating a for hire vehicle are required to pay only $1.00, Section 8, page 347.

WHEREFORE it is respectfully submitted that jurisdiction of this Court lies and that this appeal is the proper way of invoking the jurisdiction of this Court.

This 19th day of July, 1938.

EDGAR WATKINS,
ALLAN WATKINS,
Attorneys for the Appellant.

Post Office Address: 1025 Citizens & Southern, National Bank Building, Atlanta, Georgia.

EXHIBIT "A".

Opinion of the Supreme Court of Georgia.

June 17, 1938.

12230.

DIXIE OHIO EXPRESS COMPANY

v.

STATE REVENUE COMMISSION ET AL.

1. The maintenance tax act of 1937 (Ga. L. 1937, pp. 155-167) is not void on the ground that it violates the equal protection clause, or the due-process clause as embodied in article I, section 1, paragraphs 2, 3, of the constitution of this State. Code §§ 2-102, 2-103.

2. Neither is said act violative of the commerce clause as embodied in article I, section 8, paragraph 3, of the constitution of the United States. Code Section 1-125.

3. Nor is said act violative of section 1 of the fourteenth amendment of the constitution of the United States, inhibiting the passage of laws abridging the privileges or immunities of citizens. Code § 1-815.

Affidavit of illegality of execution. Before Judge Moore. Fulton Superior Court. Dec. 2, 1937.

The state revenue commission of Georgia issued a fi. fa. against Dixie Ohio Express Company, and caused the same to be levied by a sheriff of Fulton County on property of the company. The fi. fa. was issued for the amount of a license fee or a maintenance tax alleged to be due by the Dixie Ohio Express Company, under the maintenance tax act of 1937, for a truck operated by that company over certain highways of Georgia. After levy the defendant in fi. fa. filed with the sheriff an affidavit of illegality, and gave bond for the eventual condemnation-money. A general demurrer to this affidavit was filed by the State Revenue Commission, and after hearing the court sustained the demurrer and dismissed the affidavit. To this ruling the defendant excepted.

The affidavit of illegality alleges that the levy is proceeding illegally against the defendant in fi. fa. because the 1937 maintenance tax act which authorized the tax is unconstitutional, in that it violates the provisions of both the state and federal constitutions.

Briefly stated, the affidavit contains the following allegations: The Express Company is an Ohio corporation with its principal office and place of business in that state. It is engaged in the business of transporting property by motor vehicle as a common carrier for hire between the States of Ohio, Pennsylvania, New York, Kentucky, Tennessee, Alabama and Georgia. It is engaged entirely in interstate commerce, and does no intrastate commerce whatever. It hauled commodities generally from places and points in Ohio to places in Georgia, and picked up freight in Georgia destined for the States north of Georgia. In operating over the highways of Georgia its trucks did not travel over any of the rural post roads of Georgia, as defined in the act of March 18, 1937, with respect to rural post roads; its trucks operated only over state aid highways, mostly from Tennessee-Alabama line near Chattanooga to Atlanta; a permit issued to it by the Interstate Commerce Commission limited its operations over these highways; and under the federal motor carrier act of 1935 it could not operate over the rural post roads of Georgia. It owned approximately one hundred pieces of equipment, consisting of one and one-half-ton and two-ton straight trucks, and one and one-half-ton and two-ton tractors which were used to pull trailers weighing approximately four thousand pounds; it purchased a $3 license tag for each truck, and a $25 Georgia public service tag for each truck, and purchased for each of its drivers a $2 chauffeur's license; and in addition to these taxes, it paid a tax of six cents per gallon for each gallon of gas purchased in the state of Georgia, and its purchases amounted to approximately 90,000 gallons of gas per year. The maintenance tax act provides a tax of $50 on trucks of a manufacturer's rated capacity of one and one-half tons, $75 for a manufacturer's rated capacity of two-tons in the event that the trucks are operated as carriers for hire; and in the event that they are operated as carriers not for hire,

the corresponding fees would be $15 for a truck of a rated capacity of one and one-half-tons and $30 for a truck of a rated capacity of two-tons.

It was further alleged that trailers are required to pay a fee graduated according to their empty factory weight, as set out in the maintenance tax act of 1937; that the manufacturer's rated capacity and empty factory weight had no relationship to the actual weight of the vehicle and no relation with respect to the use such vehicle would make of the highways of Georgia, because a truck of a rated capacity of one ton may weigh far in excess of a truck of a rated capacity of two or three tons, for rated capacity differs greatly from loaded capacity; that a combination of a tractor and trailer would pay a far greater fee than would a straight truck of approximately the same weight, even though the truck and trailer unit would cause less wear and tear on the highways than would the straight truck with a concentration of weight; that there was no relationship between the use made of the highway by these trucks and the tax levied, because there was a discrimination against carriers for hire in favor of carriers not for hire, for the fees of the latter are much less than the fees required of the former; that there were 69,503 carriers operating over the highways of Georgia as carriers not for hire, and only 2,943 trucks operated as carriers for hire; that the taxes already paid by the motor vehicle industry more than paid the cost of maintaining and constructing the highways of the State over which the defendant in fi. fa. operates; that the state collected $1,305,999.71 from the sale of the $3 tags, of which $1,209,495.05 was allocated to the state highway fund for state aid roads, and the remainder was used for regulation purposes; that the Georgia Public Service Commission collected $73,565.00 for registration fees, of which $28,341.12 was paid to the highway fund for state aid roads, the remainder of which was used for regulation purposes; that the State collected $17,525,616.25 from gasoline taxes; that for the same year the State of Georgia spent only $11,127,258.38 for highway construction, and of the sum expended the Federal government contributed $3,721,489.90. Further, that only eleven per cent of the entire mileage traveled by the de-

fendant in fi. fa. is traveled within the boundaries of the State of Georgia, and the State collected far more than eleven per cent of the total taxes paid by it to all of the other six states through which it operates; and that if it were required to pay the same amount of taxes in the other states, it would be unable to operate at a profit.

The Dixie Ohio Express Company contends that the affidavit of illegality contained sufficient allegations to show that the levy of the fi. fa. was proceeding illegally, in that the tax sought to be collected was not due by the defendant in fi. fa., because the maintenance tax act of 1937, under which the fi. fa. was issued, was void and unconstitutional; and therefore that the court erred in dismissing the affidavit. The legal questions presented are in the affidavit if illegality, and all the grounds of the affidavit are insisted on. These in summary are whether: (1) the maintenance tax act of 1937, as applied to the plaintiff in error, is void in that it violates article 1, section 1, paragraphs 2 and 3 of the constitution of Georgia; (2) the tax is void in that it violates article 1, section 8, paragraph 3, of the constitution of the United States; (3) the tax is void in that it violates section 1 of the fourteenth amendment to the Constitution of the United States.

Watkins, Grant & Watkins, Allan Watkins, for plaintiff in error. M. J. Yeomans, Attorney General, Dave M. Parker, O. H. Dukes, W. H. Duckworth, contra.

GRICE, *Justice:*

The affidavit of illegality attacks as unconstitutional the motor bus maintenance tax act approved March 30, 1937 (Georgia Laws, 1937, pp. 155-167). The act in question, by section 1, provides "that all persons, firms, corporations or associations holding title to a motor bus, truck and/or trailer, or having exclusive right to the use thereof for a period of more than thirty days shall pay a maintenance tax for the operation of such motor bus, truck and/or trailer upon and over the public roads of this State according to the schedule" provided by the terms of the act. The maintenance tax is to be levied in addition to any and all other taxes, licenses, or registration fees required under existing

laws. The terms of the act definitely identify the license or fee prescribed as a charge for the privilege of using the highways of the State. The entire amount of the tax collected under the provisions of the act is allocated for the construction and maintenance of public highways, to-wit, post roads. No provision is made to deduct any part thereof for the expense of collection or for any regulatory purpose. By section 2 of the act are given certain definitions of the scope of the act's operation, and in section 3 the schedule of license fees to be exacted is set out. There are three classifications provided by this section: one is the license fee for the operation of passenger-carrying motor buses; another is the fee applicable to and exacted from persons operating non-passenger-carrying motor vehicles or trucks not used as common or contract carriers for hire; the third schedule applies to non-passenger-carrying motor vehicles or trucks used as common or contract carriers for hire. The license fees prescribed are different under each of these classifications. There is also a classification applying to trailers or semi-trailers, and in each main classification above referred to the trucks or buses are classified according to weight or manufacturer's rated capacity and the tax fixed according to a graduated scale; that is to say, the larger or heavier or the greater the rated carrying capacity of the truck or bus, the larger the amount of tax exacted. The statute does not undertake to make any difference or distinction between the fees or charges applicable to persons operating interstate from those applicable to persons operating intrastate. The fee is the same without reference to whether the operations are interstate or intrastate.

1. The first insistence of the plaintiff in error is that the General Assembly could not, consistently with constitutional provision, provide for one class of carriers for hire, and another class of carriers not for hire, and charge different amounts for the two classes; and that accordingly the act discriminates against Dixie Ohio Express Company, a common carrier of property for hire, in favor of private carriers of property. A State through its General Assembly may make classifications of subjects for taxation. The only constitutional requirement is that in so doing the classification so made shall have some rational basis. In

Wright v. *Hirsch*, 155 Ga. 229, 236, 116 S. E. 795, this court discussed very fully this question, and, speaking through Mr. Justice Hines, said: "The power of the legislature to classify persons for the purpose of imposing occupation taxes is undisputed. The provisions of the constitution with which we are dealing clearly recognize this power of classification. The power to classify necessarily includes the power to sub-classify. The legislature does not exhaust its power in this matter when it puts dealers of a particular kind in one class. It can place grocers in a class by themselves. It can put cigar dealers in a class by themselves. It can do the same thing with any other class of merchants. It can then sub-divide these classes into wholesale and retail dealers, and put a higher tax upon the former than upon the latter. *Cook* v. *Marshall County*, 196 U. S. 261, 255 S. C. 233, 49 L. Ed. 471. • • • In framing tax acts it has long been the custom of the legislature to divide merchants into wholesale and retail, and to place a higher occupation tax upon the former than upon the latter. This power of sub-classification has been expressly declared to exist, by this court." On the question as to the scope of the power of a legislature to make classifications of businesses or subjects as a basis for a difference in treatment for tax purposes, see also: *Johnston* v. *Macon*, 62 Ga. 645, 646; *Davis* v. *Macon*, 64 Ga. 128, 37 Am. S. T. 60; *Goodwin* v. *Savannah*, 53 Ga. 410; *Singer Mfg. Co.* v. *Wright*, 97 Ga. 114, 118, 25 S. E. 249, 35 L. R. A. 497; *Sawtell* v. *Atlanta*, 138 Ga. 687, 75 S. E. 982; *Hazleton* v. *Atlanta*, 144 Ga. 775, 87 S. E. 1043; *Price* v. *Richardson*, 159 Ga. 299, 125 S. E. 449; *Hunter* v. *Wright*, 169 Ga. 840, 152 S. E. 61; *Adams Motor Co.* v. *Cler*, 149 Ga. 818, 102 S. E. 440; *Featherstone* v. *Norman*, 170 Ga. 370, 386, 153 S. E. 58, 79 A. L. R. 449; *Southern Tfr. Co.* v. *Harrison*, 171 Ga. 358, 155 S. E. 338; *Hoffman* v. *Harrison*, 171 Ga. 792, 156 S. E. 685; *Guerry v. Harrison*, 178 Ga. 669; *Millirons* v. *Harrison*, 175 Ga. 764, 166 S. E. 231, 84 A. L. R. 1142; *Coy* v. *Linder*, 183 Ga. 583, 189 S. E. 26.

In the recent case of *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495-531 (57 Sup. Ct. 868, 81 L. Ed. 1245), the Supreme Court of the United States discussed at length the power of a state or legislative body to make classifications of property for purposes of taxation. Involved in

that case was the question of the constitutionality of the unemployment insurance compensation act of Alabama; and it was contended that the act in question constituted an infringement of the due process and equal protection clauses, on the ground that there was exempted from the provisions of the act agricultural laborers, domestic servants, employees of charitable institutions and interstate railways, etc. In other words, the basis of the constitutional attack was an alleged discrimination. Answering the contention made, the court, through Mr. Justice Stone, said: "It is inherent in the exercise of the power to tax that a State be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a State any rigid rule of equality of taxation (citing cases). This court has repeatedly held that inequalities which results from a singling out of one particular class for taxation or exemption infringe no constitutional limitation (citing cases). Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts that would support it." (Citing cases.) The court further said: "This restriction upon the judicial function, in passing on the constitutionality of a statute, is not artificial or irrational. A state legislature, in the enactment of laws, has the widest possible latitude within the limitations of the constitution. In the nature of the case it can not record a complete catalog of the considerations which move its members to enact laws. In the absence of such a record courts can not assume that its act is capricious, or that, with its informed acquaintance with the local condition, to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function."

For other rulings on this same general subject by the Supreme Court of the United States, see *Carley* v. *Snook*,

281 U. S. 66, 50 S. C. 204; *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U. S. 285, 55 S. C. 709, 79 L. Ed. 1439; *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 52 S. C. 595; *Clark* v. *Poor*, 274 U. S. 554, 47 S. C. 702; and *Morf* v. *Bingham*, 298 U. S. 412. We think that the general assembly can, for the purpose of taxation of this character, make classifications of carriers by truck, and make as one class those operating for hire either as contract or common carriers and the other as carriers not for hire. A rational basis for such classification readily appears. The carrier not for hire transports over the highways his own goods or property. He uses the highways only as the circumstances and exigencies of his own business required. His use of the highways is incidental only, while the carrier for hire operates over the highways transporting property of others, and charges compensation therefor. He makes the highways his place of business, and the natural tendency will of course be for him to use the highway more, truck for truck, than does the carrier not for hire. In many cases courts of last resort have held that the classification is justified; that the lawmaking body may tax the common carrier for hire using the highways and exempt altogether the carrier not for hire. Like classifications for similar purposes have been upheld by the courts generally. In *Bekins Van Lines* v. *Riley*, 280 U. S. 80, 50 S. C. 64, the Supreme Court of the United States was asked to strike down an amendment to the Constitution of California and statutes of that State laying upon common carriers engaged in transporting freight by motor vehicles for hire along public highways between fixed termini and over regular routes in California a tax upon their gross receipts, while other carriers were subjected to different and less burdensome taxation. The court held that there was no violation of the equal protection clause, "since it can not be said that the classification lacks any reasonable basis." In the opinion it was said: "Appellants voluntarily assumed the position of common carriers operating between fixed termini and enjoy all consequent benefits. That a marked distinction exists between common and private carriers by auto vehicles appears from *Frost* v. *Railroad Commission*, 271 U. S. 583, 46 S. C. 605, 70 L. Ed. 1101, and

Michigan Public Utilities Commission v. *Duke*, 266 U. S. 570, 45 S. C. 191, 69 L. Ed. 445. Sufficient reasons for placing common carriers, operating as appellants do, in a special class are pointed out by *Raymond* v. *Holm*, 165 Minn. 215, 206 N. W. 166; *State* v. *LeFebvre*, 174 Minn. 248, 219 N. W. 167; *Iowa Motor Vehicle Assn.* v. *Board of Railroad Commissioners*, 207 Iowa 461, 221 N. W. 364; *Liberty Highway Co.* v. *Michigan Public Utilities Commission*, 294 Fed. 703. Their use of the highways probably will be regular and frequent, and therefore unusually destructive thereto. Also it will expose the public to dangers exceeding those consequent upon the occasional movements of other carriers." See also the annotations appended to the report of the case of *Public Service Commission of Wyoming* v. *Grimshaw*, 49 Wy. 158, 52 Pac. 2nd 1, 109 A. L. R. 534, 566.

2. The maintenance tax act is also criticised by plaintiff in error in that in each main classification, that is to say, the carriers for hire and the carriers not for hire, there is set up a sub-classification based on the manufacturer's rated capacity of the vehicles used, and fixing a different rate of tax according to the manufacturer's rated capacity, and that there is no relationship between the manufacturer's rated capacity of a truck or motor vehicle and its weight, and consequently no reasonable relationship between the manufacturer's rated capacity and the wear and tear that such vehicle will cause to the highways by its use. The affidavit of illegality recites that "Rated capacity denotes the power of the motor, and not the weight or carrying capacity of the body of the truck." Even so, it would seem that the manufacturer's rated capacity of a motor vehicle has a direct and natural relation to the propensities of the vehicle to injure the highways, and to create public hazards. To make a classification based on the horsepower of the motor is not an arbitrary classification. It was expressly so decided in *Lee* v. *State*, 163 Ga. 239, 242; in *Hendrick* v. *Maryland*, 235 U. S. 610, 35 S. C. 140, 59 L. Ed. 385, and in *Kane* v. *New Jersey*, 242 U. S. 160, 167, 37 S. C. 30, 61 L. Ed. 222. See also *Hicklin* v. *Coney*, 290 U. S. 169, 54 S. C. 142, 78 L. Ed. —; *Carley* v. *Snook*, *supra*.

3. Still another ground of attack is that the tax collected is not used on the highways over which the plaintiff in error operates its trucks, but under the terms of the act it is allocated to rural post roads; that it is impossible for it to use the rural post roads of Georgia, because its routes within this State have been limited by the certificate granted it by the Interstate Commerce Commission pursuant to the Federal Motor Carrier Act of 1935. U. S. C. A. title 49, Sections 301, 306. However, the privilege granted the carrier by the maintenance tax act of 1937 here under attack is unlimited. Under it, the carrier, provided it complies with other requirements of law as to license fees, etc., may use every road in the system, including those to the maintenance of which the tax here challenged is allocated, to-wit, those roads, to use the words of the statute, in the "United States rural post roads division of the State highway of Georgia." In *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission, supra,* it was said: "One who receives the privilege without limit is not wronged by his own refusal to enjoy it as frequently as he may." The decision in *Clark* v. *Poor, supra,* dealt with an Ohio statute, and is in point here. It was there held: "A State regulation providing that, before operating over the State highways, a common carrier by motor shall apply for and obtain a certificate or permit therefor from the State commission, and shall pay an extra tax for the maintenance and repair of the highways and for the administration and enforcement of the laws governing their use, is constitutional though applied to carriers engaged exclusively in interstate commerce * * * that the tax so exacted is not all used for maintenance and repair of the highways, but some of it for defraying expenses of the commission in administration and enforcement of the act, and some for other purposes, is no concern of the taxpayer, it be assessed for a proper purpose and not unreasonable in amount." In the opinion it was said: "The plaintiffs claim, as applied to them, the act violates the commerce clause of the Federal constitution. They insist, that, as they are engaged exclusively in interstate commerce, they are not subject to regulation by the State; that it is without power to require that before using its highways they apply for and obtain a cer-

tificate; and that it is also without power to impose, in addition to the annual license fee demanded of all persons using automobiles on the highways, a tax upon them, under Section 614-94, for the maintenance and repair of the highways and for the administration and enforcement of the laws governing the use of the same. The contrary is settled. The highways are public property. Users of them, although engaged exclusively in interstate commerce, are subject to regulation by the State to insure safety and convenience and the conservation of the highways. Citing *Morris* v. *Duby* (274 U. S.) 135, 47 S. C. 548; *Hess* v. *Pawloski* (274 U. S.), 352, 47 S. C. 632. Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and up-keep. Common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use. Citing *Hendrick* v. *Maryland; Kane* v. *New Jersey, supra.* Compare *Packard* v. *Banton,* 264 U. S. 140, 144, 44 S. C. 257, 68 L. Ed. 596." One of the grounds of attack in the case just referred to, it is to be noted, was that not all of the tax was used for the maintenance and repair of the highways; that some of it was used for defraying the expense of the commission in the administration and enforcement of the act, and some for other purposes. The court said: "Since the tax is assessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs." The plaintiff in error relies on *Interstate Transit, Inc.,* v. *Lindsey,* 283 U. S. 183, 51 S. C. 380; but it was distinctly ruled in that case that "A detailed examination of the statute under which the tax here challenged was laid makes it clear that the charge was imposed, not as compensation for the use of the highways, but for the privilege of doing the interstate bus business." In the opinion it was said: "While a State may not lay a tax upon the privilege of engaging in interstate commerce, *Sprout* v. *South Bend,* 277 U. S. 163, 48 S. C. 502, it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and regulating the

traffic thereon. Citing *Kane* v. *New Jersey; Clark* v. *Poor; Sprout* v. *South Bend, supra.* As such a charge is a direct burden on interstate commerce, the tax can not be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expenses of regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use (*Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245, 48 S. C. 230), or by the express allocation of the proceeds of the tax to highway purposes, as in *Clark* v. *Poor, supra,* or otherwise. Where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory. *Hendrick* v. *Maryland, supra; Interstate Busses Corp.* v. *Holyoke Street Ry.,* 273 U. S. 45, 51, 47 S. C. 298." See also *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission,* 179 Ga. 431, 176 S. E. 487, 295 U. S. 285, *supra.*

4. It follows that the maintenance tax act approved March 30, 1937 (Ga. L. 1937, p. 155), is not violative of article I, section 1, paragraphs 2 and 3 of the constitution of this State, which declare that "Protection to person and property is the paramount duty of government, and shall be impartial and complete," and "No person shall be deprived of life, liberty, or property, except by due process of law;" or of article I, section 8, paragraph 3, of the constitution of the United States, which provides that "The Congress shall have power * * * to regulate commerce with foreign nations and among the several states and with the Indian tribes;" or of the due-process clause of the fourteenth amendment of the constitution of the United States, which declares that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Judgment affirmed.

All the Justices concur.

Filed in office Jul. 20, 1938. K. C. Blackley, C. S. C. Ga.